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In the Supreme Court of the United States

OCTOBER TERM, 1966

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No. 1238

JAMES J. RUSH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

o——o——o

No. ———

ALFRED J. DENNIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

o——o——o

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

o——o——o

CLAYTON H. SHROUT,
1004 City National Bank Building
Omaha, Nebraska
Attorneys for Petitioners.

Law Briefs—OMAHA LINO-SLUG PRINTING CO., 415 So. 15th St.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

o——o——o

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cases on January 13, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, entered on January 13, 1967, is printed in Appendix "A" hereto, infra pp. 8-14, and is reported in — Fed. 2d —.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on January 13, 1967, and is printed in Appendix "B", page 15 infra. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1). Rule 22 (2).

QUESTIONS PRESENTED

Whether petitioners were entitled as a matter of law to dismissal of the information charging them with certain violations of the Federal Food, Drug, and Cosmetic Act because the Government's case against each of the defendants showed unlawful entrapment per se of said defendants?

Were the verdicts returned inconsistent with the evidence presented?

STATEMENT

Petitioner James J. Rush was convicted on five Counts of a five-Count indictment. In four of the Counts he was charged with dispensing dexedrine sulfate tablets and chloral hydrate capsules as refills for prescriptions, which refills were without authorization from the prescribing physician except that in Count three he was charged with selling dexedrine sulfate tablets in first instance without a prescription. Count five upon which he was convicted charged him with being the owner of a certain business known as the Ralston Pharmacy and charged him with responsibility for

all sales of the said Ralston Pharmacy at the times delineated in the several counts of the Information. The defendant Alfred Dennis was charged on two Counts of the Information with dispensing dexedrine sulfate tablets as refills of a prescription without authorization. Apparently by mistake he was originally convicted on five Counts though he was only charged in the two Counts mentioned.

Petitioners' Motion for a New Trial was sustained on April 3, 1964.

Thereafter on January 12, 1965 the matter was again tried, this time by stipulation of the Government and defendants, without a jury. The parties further stipulated that the transcript of the evidence of the original trial, including all exhibits which had been offered and received, could be offered and received into evidence at the re-trial.

The Petitioners were again convicted.

The Court of Appeals for the Eighth Circuit affirmed the convictions on January 13, 1967, and by its order of January 13, 1967, the judgment and sentence of the Trial Court was affirmed.

The pertinent evidence elicited by the Government at the first trial, which evidence was stipulated at the second trial came from two Agents for the Food and Drug Administration. Agent Thomas M. Rice testified that he was acquainted with the location of the business known as the Ralston Pharmacy and with James Rush, its owner. He stated that his Kansas City District Office assigned him to an inspection duty relative to the Ralston Pharmacy in March, April and May of 1960. Agent Clifford T. Bryant testified that he was assigned to the same inspection during the same period of time.

The entrapment of the defendants by the two Government Agents followed the same pattern. Each agent obtained a prescription from one John Dewey, M.D. In each instance the prescription was for chloral hydrate. Agent Rice concentrated his efforts on the defendant James Rush. Agent Bryant concentrated his efforts on the defendant Alfred Dennis, a registered Pharmacist working for James Rush, and also on James Rush. Agent Rice testified that his original prescription was filled by James Rush and thereafter upon his request Rush illegally sold him a double refill of the same prescription plus two dozen dexedrine tablets. Agent Bryant testified that his original prescription was filled by Alfred Dennis and thereafter upon his request Dennis, upon two different occasions, illegally sold him a single and double refill of said prescription. Bryant also testified that the defendant Rush illegally sold him a double refill of said precription. The Agents testified that they were not suffering from any illness at the time of procuring said prescriptions and causing same to be filled and refilled.

The only evidence bearing upon whether or not there were independent grounds for defendants' entrapment came from Agent Rice who stated that he had phoned his superior in Kansas City for authorization to make the investigation which phone call was predicated upon a complaint personally received by him.

Petitioners contend that there is no indicative evidence that the Government had any independent reasonable grounds for believing that the defendants were engaged in illegal sales of drugs prior to the entrapment herein described. In fact the evidence was to the contrary. The defendant Rush testified that he had graduated from Creighton University Pharmacy School in 1934 and had been a practicing pharmacist since that time. During all the years until the date

of these alleged offenses in 1960 he had never been accused of nor had he ever violated any State or Federal Laws pertaining to the operation of his pharmacy. The defendant Dennis testified that he had graduated from Creighton University Pharmacy School in 1953 and that except for a two year stint in the Army he had practiced his profession since graduation. There is no testimony to indicate that he ever violated any Federal or State Laws pertaining to the dispensing of drugs. Except, perhaps, for innuendo and attempted hearsay and the iota of testimony of Agent Rice, the Government did not attempt to prove independent reasonable grounds for staging the entrapment here involved.

Defendants contend that, as a matter of law, the information upon which they were convicted should have been dismissed.

REASONS FOR GRANTING THE WRIT

1. The first Trial Court erred in overruling defendants' Motions to dismiss the information, against these defendants, made at the close of the Government's case and again at the close of the defendants' case. The second Trial Court erred in failing to dismiss the information after the matter was submitted. The Eighth Circuit Court of Appeals erred in sustaining the Trial Court.

The decision of the Court below, in the instant case, is in direct conflict with the holding of this Court in *Sherman v. United States*, 356 U.S. 369, 2 L. ed. 2d 848, 785 S. Ct. 819, wherein the guide lines for entrapment are spelled out. Agents Rice and Bryant obtained prescriptions from a licensed physician for drugs not needed by them, for medicinal and therapeutic purposes, for the sole purpose of entrapping these defendants who appear from the record to be

otherwise innocent. In this connection, the pertinent language of the Sherman case is as follows:

> "Entrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials, that is, when the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute; on the other hand, the fact that Government Agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment."

2. The Eighth Circuit opinion cites this Court's holding in *Sorrells v. United States,* 287 U.S. 435, 77 L. Ed. 413, in which the law was expressed as follows:

> "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

At the risk of redundancy we point out again that these defendants, at least on the record, are not shown to have engaged in any illicit traffic of drugs prior to their entrapment by Agents Rice and Bryant. The Eighth Circuit opinion states on page 6. "That the Government Agents did not

simply seek out the defendants by chance". Perhaps so, but the record also fails to disclose that the Agents had any substantial reason for seeking out the defendants and inducing them to commit a crime. Petitioners doubt that it was ever the intent of the law to permit the lawful entrapment of an otherwise innocent person solely on the basis of an unsubstantiated "complaint". This especially in the case at bar when the details of the "complaint" were never made known to these defendants.

3. The Eighth Circuit Court makes the question of unlawful entrapment herein one of fact by observing that the defendants needed no coaxing to refill the prescriptions and were quite ready and willing to do so. We believe that this observation somewhat isolates the fact that the defendants did not argue or protest from the context of the entire situation. In the beginning there were prescriptions from a licensed physician; then the defendants say that the Agents always had plausible reasons for refilling the prescriptions without authorization from the doctor. Moreover, Petitioners contend that the intensity of their reluctance is extraneous if, in the first place, there were no independent reasonable grounds for the entrapment.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

CLAYTON H. SHROUT,
1004 City National Bank Building,
Omaha, Nebraska,
Counsel for Petitioner.

March, 1967.

APPENDIX A

(Opinion Below)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18,285

James J. Rush,

Appellant,

vs.

United States of America,

Appellee.

No. 18,286

Alfred J. Dennis,

Appellant,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the District of Nebraska

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[January 13, 1967.]

Before MATTHES and LAY, Circuit Judges, and HARPER, District Judge.

HARPER, District Judge.

The appellants (defendants below and hereinafter referred to as defendants), James J. Rush and Alfred J. Dennis,

appeal from a judgment of guilty to five counts of violating the Federal Food, Drug and Cosmetic Act (21 USCA §301 et. seq.).

Defendant Rush was found guilty on Counts I through V and defendant Dennis was found guilty on Counts I and IV. The case was tried before the court without a jury and we must affirm. The sole question raised by the appellants on this appeal is whether the trial judge (Van Pelt, J.) should have ruled, as a matter of law, that the defendants were entitled to an acquittal based upon unlawful entrapment.

On April 24, 1961, the United States Attorney filed an information in five counts against the defendants, James J. Rush, an individual doing business as Ralston Pharmacy, and Alfred Dennis, an individual. Defendant Dennis was only charged in Counts I and IV.

The defendants pleaded not guilty to all of the counts, and the case went to trial before a jury (Robinson, J.). The jury returned a verdict of guilty against both of the defendants on all five counts. The defendants subsequently filed a motion for Judgment of Acquittal or in the Alternative, Motion for New Trial. Judge Robinson granted a new trial and transferred the case to Judge Van Pelt, where the defendants waived a jury trial.

At the second trial, the one from which this appeal is taken, it was stipulated that all exhibits and the transcript of testimony from the first trial (with certain deletions and corrections) would be admitted in evidence, and some additional testimony of the defendants was heard.

Judge Van Pelt entered a Memorandum and Order in which he found the defendants guilty, summarizing the evidence as to each count as follows:

> "*Count I.* This count charges that on April 22, 1960, the defendant Rush, as proprietor, and the defendant Dennis, as an employee, dispensed to Clifford T. Bryant, an inspector for the United States Food and Drug Administration, dexedrine sulfate tablets as an unauthorized refill of a prescription. The evidence sustains a finding in conformity with this charge. On April 19, 1960, inspector Bryant presented a prescription for dexedrine sulfate tablets to the defendant Dennis, which was accordingly filled without incident. Thereafter, on April 22, Bryant returned and presented the vial to Dennis for refilling which was also accomplished at that time. Dennis testified that Bryant told him that his physician had asked that the prescription be refilled and that he, Dennis, relied upon this statement. The tablets issued on the 19th, if taken according to directions, would have lasted 24 days. Under both versions the evidence establishes a violation of the applicable statutes.
>
> "*Count II.* By this count it is alleged that on or about April 23, 1960, the defendant Rush dispensed to Thomas M. Rice, another Food and Drug Administration inspector, an unauthorized refill of a chloral hydrate prescription. The evidence would indicate, and the court so finds, that agent Rice took a prescription for chloral hydrate to the Ralston Pharmacy on March 21, 1960, where it was promptly filled by Mr. Rush. On April 23 Rice returned and asked for a double refill which was furnished, according to Rice, without further comment by either party. Rush testified, in substance, that Rice asserted that the prescribing physician was desirous that the refill be made as ordered. It is clear, however, that the double refill was dispensed without a physician's authorization being obtained.

"*Count III.* The allegations contained in this count are directed against Mr. Rush and assert that on April 23, 1960, he sold dexedrine sulfate without a prescription to agent Rice. Rice's version of the sale was simply that he asked for two dozen dexedrine tablets for his wife and that Rush furnished the same without further comment. Rush testified that agent Rice represented that his wife had a prescription at their home which was ten miles away and that they were leaving town and 'just wanted a few to hold him until he got back to town.' Again, however, it is altogether clear that the defendant Rush dispensed the drug without a physician's prescription.

"*Count IV.* In Count IV it is alleged that on or about May 2, 1960, the defendant Dennis as employee and the defendant Rush as proprietor sold to agent Bryant a refill prescription for dexedrine sulfate without authorization. The only difference in testimony regarding this count is what was said by Bryant. Bryant himself claims to have merely asked for a double refill so he would not have to come back so often, whereas Dennis testified that Bryant represented that the prescribing physician wanted continuation of the medication and further, that he was going out of town for a while which necessitated the request for a double dosage. Under either interpretation there was an unauthorized refill in violation of the applicable statutes, and the court so finds.

"*Count V.* The final count alleges a refill of dexedrine sulfate by Mr. Rush for Mr. Bryant on May 5, 1960. Bryant testified that he handed the prescription vial to Rush and said he would like to have it refilled. Rush reportedly said 'All right,' and the refill was made. In regard to this transaction also, Rush testified that Bryant told him that the doctor 'said to keep on taking them.' Again, however, the facts establish a statutory violation."

Judge Van Pelt then considered and rejected the defense of unlawful entrapment.

The appellants' only contention here is that, as a matter of law, they were entitled to a finding of unlawful entrapment. In support of their contention the appellants state:

> "The law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by the law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, and the government then has the burden of proving lawful entrapment."

In the very recent case of *Calvin Rogers v. United States,* 367 F. 2d 998 (Eighth Circuit, November 8, 1966), this court considered a similar contention. We repeat the law as expressed in that case, l. c. 1001:

> "Unlawful entrapment is the solicitation of an otherwise innocent person to commit a crime solely for the purpose of prosecution. It arises where the criminal purpose or design originated in the minds of government officials and such criminal purpose or design is implanted in the mind of an otherwise innocent person, the object being his prosecution. In the much-quoted case of *Sorrells v. United States,* 287 U.S. 435, 77 L.Ed. 413, the Supreme Court held that under the evidence in that case the question of entrapment should have been submitted to the jury. Mr. Chief Justice Hughes, speaking for the court, stated at pages 441-442 of 287 U.S.:
>
> > "'It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. (Citing cases.) The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent

> use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

The testimony in this case indicates that the government agents did not simply seek out the defendants by chance to see if they could get them to commit a crime, but that Thomas M. Rice, an inspector for the Federal Food and Drug Administration, who was stationed in Omaha, Nebraska, received a complaint in early 1960 concerning the defendant's activities, following which he was authorized by his superiors in the Kansas City office to investigate the Ralston Pharmacy. Pursuant to the assignment Agents Rice and Bryant secured prescriptions from Dr. John Dewey for the medication more particularly described in Counts I, II, IV and V, which prescriptions were filled at the Ralston Pharmacy and thereafter refilled without authority from the doctor. The medication more particularly described in Count III was secured from the defendant Rush without the benefit of a prescription, although a prescription was required. The testimony further disclosed that the defendants were quite ready and willing to refill the prescriptions described in Counts I, II, IV and V without authorization from the doctor, and to sell the drugs set out in Count III without the benefit of a prescription, and needed no coaxing from Agents Rice or Bryant who were involved in the purchases. As Judge Van Pelt so aptly stated in his opinion, "Even by the defendants' testimony there was no inordinate prevalence or inducement, but merely assertions that the prescribing physician desired the continuation of the medication."

Unless it can be decided as a matter of law, the issue of whether a defendant has been unlawfully entrapped is for the jury as part of its function of determining the guilt or innocence of the accused. *Sherman v. United States,* 356 U.S. 369, 377.

In the light of the evidence in this case we cannot say that the defense of unlawful entrapment was established as a matter of law, and, therefore, the question of whether the defendants were unlawfully entrapped by Agents Rice and Bryant was one of fact for the judge, who, in the absence of a jury, was performing their function. See *Masciale v. United States,* 356 U.S. 386, and also *Calvin Rogers v. United States,* supra.

Judgment affirmed in accordance with this opinion.

A true copy.

Attest.

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

(Judgment Below)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1966

No. 18285

James J. Rush,

Appellant,

vs.

United States of America,

Appellee.

and

No. 18286

Alfred J. Dennis,

Appellant,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the District of Nebraska

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These causes came on to be heard on the record from the United States District Court for the District of Nebraska, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment and sentence of the District Court, in these causes, be, and the same is hereby, affirmed.

January 13, 1967

Order entered in accordance with Opinion: Robert C. Tucker, Clerk, U.S. Court of Appeals for the Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1238

JAMES H. RUSH AND ALFRED J. DENNIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (C.A.R. 1–7;[1] Pet. App. 8–14) is not yet reported. The opinion of the district court (R. 57–66) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1967 (C.A.R. 8; Pet. App. 15–16). A petition for rehearing was denied on February 7, 1967 (C.A.R. 10–16). On March 7, 1967, Mr. Justice White extended the time for filing a petition for a writ of certiorari to April 8, 1967. The petition was

[1] "C.A.R." refers to the record in the court of appeals; "R." refers to the record in the district court.

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filed on April 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, as a matter of law, petitioners were entrapped into dispensing drugs without authorization of a prescribing physician.

STATEMENT

After a trial before the United States District Court for the District of Nebraska, petitioner Rush was convicted on five counts, and petitioner Dennis (a pharmacist employed by Rush) on two counts, of an information charging the dispensing of drugs without authorization of the prescriber or without a prescription, in violation of 21 U.S.C. 353(b)(1) and 21 U.S.C. 331(k) (R. 1–5, 57–66). On January 18, 1966, Rush was sentenced to pay a fine of $250 on each of the five counts (a total fine of $1,250), the imposition of further sentence was suspended, and he was placed on probation for two years. Dennis was fined $100 on each count (a total of $200) and placed on probation for two years (R. 69–71). On appeal the convictions were affirmed (C.A.R. 8; Pet. App. 15–16).

The evidence showed that from March through May 1960 one Rice, an inspector for the United States Food and Drug Administration, engaged in an investigation of drug sales made at Rush's pharmacy at Ralston, Nebraska (Tr. 4–5),[2] having been authorized

[2] "Tr." refers to the trial transcript of the first jury trial on February 21, 1962. A new trial had been granted after the defendants were found guilty (Tr. 45–52). It was stipulated that the trial transcript of the first trial and the exhibits in-

to do so after receiving a complaint as to Rush's operation of his business (Tr. 28–29). Rice and Inspector Bryant, for the purposes of the investigation, obtained from a Dr. Dewey two prescriptions, one for chloral hydrate capsules and the other for dexedrine sulfate pills (Tr. 6–7, 48–49, 75–77).

On April 19, 1960, the prescription for dexedrine sulfate tablets was presented by Bryant at Rush's pharmacy and filled by Dennis (Tr. 48–50). On April 22, Bryant had the prescription refilled by Dennis, who did not obtain the authorization of Dr. Dewey (Tr. 51–52, 76, 79). Dennis testified that Bryant told him that his physician had requested that the prescription be refilled and that he, Dennis, believed this statement (Tr. 145). The tablets issued on April 19, if taken according to directions, would have lasted 24 days (Tr. 146). On May 2, Bryant asked for a double refill so he would not have to come back so often (Tr. 54), and Dennis furnished the double dosage without authorization (Tr. 53–54, 78–79). Dennis testified that Bryant said his doctor wanted the medication continued, and that since Bryant was to be out of town for a long time he wanted the double dosage (Tr. 146).

On March 21, 1960, Rice had the prescription for the chloral hydrate filled by Rush (Tr. 7). When Rice returned on April 23 he asked for a double refill of the prescription, which Rush gave him without Dr. Dewey's authorization (Tr. 9–11, 77, 79). Rush testi-

troduced there could be used at the second trial (R. 85(2), 85(3)), which resulted in the convictions petitioners seek to have reviewed.

fied that Rice represented that the doctor had told him to get a refill (Tr. 112). On April 23, Rush also sold Rice two dozen dexedrine tablets for his wife without any mention of a prescription (Tr. 9, 11). Rush's testimony was that Rice said his wife had a prescription at home and that he "just wanted a few to hold him until he got back to town" (Tr. 114–115).

On May 5, Bryant returned to the pharmacy, gave Rush the original prescription vial, and asked for a double refill of the chloral hydrate. Rush refilled the prescription (Tr. 57–58). Rush testified that Bryant said he wanted a refill since the "doctor said to keep on taking them" (Tr. 116).

Rush testified that prior to May 5, 1960, he never refilled a prescription for either dexedrine sulfate or chloral hydrate without checking with the doctor (Tr. 135). In rebuttal (Tr. 186b), the court permitted Rice to testify that Rush had refilled a prescription without the physician's authorization on March 30 and on April 13, 1960 (Tr. 185–186a, 189–190), and that Dennis had done so on April 7, 1960 (Tr. 187–188).

ARGUMENT

There is no substance to petitioners' contention that they were entrapped as a matter of law. Entrapment occurs only when criminal conduct is "the product of the *creative* activity" of law enforcement officials. *Sherman* v. *United States,* 356 U.S. 369, 372. Here petitioners made all of the illegal sales immediately and without importuning by the agents. As the trial court observed: "Even by the defendants' testimony

there was no inordinate * * * inducement, but merely assertions that the prescribing physician desired the continuation of the medication" (R. 64).

There is no requirement that there be "independent reasonable grounds" (Pet. 7) before government agents may approach possible law violators in an investigation of criminal activity. In any event, it was only after a complaint as to Rush's activities had been made that the investigation here was begun. Upon the entire record the district court, as fact-finder, properly found that there had been no entrapment. See, *e.g., Masciale* v. *United States,* 356 U.S. 386.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967